statutes have provided for such taxation of nonresidents since at least 1894. *See* Joseph Isenbergh, *U.S. Taxation of Foreign Persons and Foreign Income* ¶ 30.2 (2002 ed.).[4] U.S. tax law specifically provides that (with some exceptions adopted for reasons not relevant here) income derived by a nonresident from the performance of services within the United States is subject to its income tax. *See* 26 U.S.C. § 864(b)(1).

Similarly, every state that has an income tax takes the same approach. That is, each such state has exercised the authority that this Court in *Shaffer* affirmed it had and taxed the income earned by nonresidents within its borders. *See* St. Tax Guide (CCH) ¶ 200 *et seq.* (listing state statutes authorizing taxation of all income earned within the state). Even Puerto Rico and the Virgin Islands do so. *See* P.R. Laws Ann. 13 § 8605 (1995); 33 V.I. Code Ann. § 541 (1986). None – not a single one – gives nonresidents a "free pass."[5] To avoid double-taxing residents who work in other states, states typically provide their residents with a credit for the income tax they paid the state where the income was earned, up to the amount of tax such residents would otherwise have owed to their home state on such income. Maryland and Virginia are no different in this regard, since each would allow a credit against its income tax for income

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[4] Prof. Isenbergh, like Professors Hellerstein, is a leading authority in his field, and his treatise, like theirs, was cited by this Court in *Chickasaw Nation*.

[5] To be sure, some states choose to enter into a treaty (a "reciprocal agreement") with some neighboring states whereby each agrees not to tax the wages or salaries earned by residents of the other. *See* St. Tax Guide (CCH), Charts ¶ 700-600 (Jan. 2005). States may decide whether to enter into a reciprocal agreement and presumably do so when it does not harm them economically and is to their administrative or other benefit.

taxes paid to the District. *See Roach v. Comptroller of the Treasury*, 610 A.2d 754 (Md. 1992); *Mathy v. Dep't of Taxation*, 483 S.E.2d 802 (Va. 1997). So, the proposed nonresident income tax payable to the District would be offset by a credit against the income tax due to a nonresident's home state. (*See* Pet'rs Br. 8).

Indeed, the taxation of nonresidents on the income they earn within a jurisdiction is such a fundamental principle of public finance that it extends not just to those who travel every day from their home in one jurisdiction to their place of business in another but also to those who may have been in the jurisdiction only briefly. And taxing authorities can be quite vigorous in assuring that the tax is collected on income earned during such brief stays, at least if the amount is enough to warrant the effort.

This is true with respect to U.S. income taxation. *See, e.g., Ingram v. Bowers*, 47 F.2d 925 (S.D.N.Y. 1931), *aff'd*, 57 F.2d 65 (2d Cir. 1932) (involving the royalties which the famed Italian singer Enrico Caruso received for recording a few songs at the New Jersey studio of The Victor Company pursuant to a 1909 agreement, which were subject to U.S. tax as payments for services performed in the U.S. even though derived in part from foreign record sales). *See also Johansson v. United States*, 336 F.2d 809 (5th Cir. 1964) (U.S. income taxation of the Swedish heavyweight boxer Ingemar Johansson on the purses he received from his celebrated prize fights with Floyd Patterson). And it is equally true with respect to state taxation. For example, the Commonwealth of Virginia has imposed its income tax on Tennessee residents who work at a hospital that straddles the

Tennessee/Virginia border. *See* Tenn. Op. Atty. Gen., No. 84-193 (Tenn. A.G. 1984).[6]

Congress has denied only the District, alone among all U.S. jurisdictions, the benefit of taxing all income earned within its borders. Congress has not denied itself, or any other jurisdiction except the District, the right to tax income earned within its borders. The Prohibition is truly one of a kind.

II. THE PROHIBITION HAS A SEVERE DETRIMENTAL EFFECT ON THE DISTRICT'S FISCAL HEALTH.

Because of the Prohibition, the District must over-tax D.C. residents in order to provide merely a basic level of public services. GAO Report at 12. Furthermore, the District's finances are constrained by a substantial "structural imbalance" that ensures the District's expenditures will constantly outpace the city's ability to raise revenue. *Id.* at 4, 12.

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[6] For other examples of the lengths to which states are willing to go to tax nonresidents, *see* Richard R. Hawkins, Terri Slay & Sally Wallace, *Play Here, Pay Here: An Analysis of the State Income Tax on Athletes*, 26 State Tax Notes (Nov. 25, 2002) (reporting on a survey the authors conducted of state income taxation of visiting professional athletes and indicating that each of the twenty-five states which completed the survey stated that they taxed the income such visiting athletes earned when playing the state's home team(s)). *See also Speno v. Gallman*, 35 N.Y.2d 256 (1974) (nonresident employee of a New York business required to pay New York income tax on portion of salary attributable to days he worked from his home in New Jersey where employee's business activities were for his convenience, rather than for the convenience of the employer).

This annual structural deficit is beyond the control of the District's elected officials and amounts to between $470 million and $1.1 billion each year. GAO Report at 8, 12. Even if the District were to cut expenditures further, conduct operations as efficiently as possible, and impose higher taxes on its citizenry, the structural imbalance would remain. *Id.* at 15. And leading Washington area business and civic groups have all recognized that this structural imbalance has impaired the District's ability to attract new residents and businesses, provide necessary services, and maintain infrastructure. *See* Testimonies of Fred Thompson, President, Federal City Council, Ted Trabue of the Greater Washington Board of Trade, and Stephen J. Trachenberg, Chairman of the Board, D.C. Chamber of Commerce before the Subcommittee on the District of Columbia of the Senate Committee on Appropriations, June 22, 2004. Moreover, the GAO report illustrates that a key factor driving the structural imbalance is the Prohibition.[7] GAO Report at 43. Because of the Prohibition, the District is unable to tax two-thirds of the income earned in the city, which amounts to over $30 billion annually. (Pet. App. 69a-70a).

The Prohibition has a particularly insidious effect on the District's efforts to promote economic opportunity for its residents and grow its way out of any fiscal imbalance. As do other jurisdictions, the District attempts, through property tax abatements and other incentives, to persuade employers to remain or locate in the District. Because of the

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[7] Other constraints include: (1) the District's inability to tax 42% of the real property in the city because that property is owned by the federal government, foreign governments, or international institutions; and (2) the limitation resulting from the federally-imposed height restrictions on D.C. structures on the District's ability to tax high-density real property. GAO Report at 43.

Prohibition, however, it competes on a less-than-level playing field in these efforts. Since so many of those who work in the District live in Maryland or Virginia,[8] much of the increased job opportunities and enhanced tax revenues resulting from the District's efforts inures to the benefit of the neighboring states. Given that a substantial portion of the new jobs will be filled by commuters living in Virginia or Maryland (or other states), it is those states that will enjoy the largest share of the increased tax revenues generated by those jobs. This leaves the District with only modest left-overs, such as income tax from the small fraction of employees living in the District, some sales tax on the employees' meals and sundries, and (if the employer is not an exempt institution) some income tax from the business.[9] In other words, although the District expends the resources, because of the Prohibition it is the neighboring states that reap much of the reward.

Thus, because of the Prohibition, the District truly faces a catch-22 dilemma. Either it does nothing to attract

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[8] The 2000 Census indicates that more than 2 out of every 3 jobs in the District are filled by non-residents. U.S. Census Bureau, *County-to-County Worker Flow Files*, at http://www.census.gov/population/www/cen2000/commuting.html#DC.

[9] Indeed, in light of a recent decision of the D.C. Superior Court holding that the District's franchise tax on unincorporated rental real estate businesses violates the Prohibition insofar as it burdens nonresident individuals who are owners thereof, it is entirely possible that all business income earned in the District by nonresidents – not just from personal or professional services provided by the nonresident but also from such capital-intensive, purely local activities as retail sales or rental real estate – will be excluded from income tax in the District unless the business (or its owners) choose for regulatory or other reasons to incorporate. *See Bender v. District of Columbia*, No. 8524-05 (D.C. Super. Ct., Mar. 8, 2006).

and retain employers in the face of constant criticism to do more, or it does what it can even though much of the benefit will flow to its neighbors.[10] Accordingly, the suggestion in the Opinion of the Court of Appeals that the Prohibition may have been prompted by a concern that, otherwise, employers might decide to move out of the District rather than subject those of their employees who do not live in the District to the District's high tax rates (*see* Pet. App. 11a) is quite ironic and misperceives what is the cause and what is the effect: it is not that high rates caused the Prohibition; rather, as shown in the

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[10] Consider, for example, the debate over the last few years regarding the relocation of a Major League Baseball team to Washington, D.C. The mean baseball team payroll is approximately $69,000,000. USA Today, Inc., *USA Today Salaries Database*, at http://asp.usatoday.com/sports/baseball/salaries/totalpayroll.aspx?year=2005. Many states apportion a team member's income based on "duty days" and apply a rule that there are roughly 220 duty days in a baseball season. Thomas Heath & Albert Crenshaw, *In Professional Sports, States Often Claim Players*, *Wash. Post*, Feb. 24, 2003, at D1. In a 162-game season, there would be 81 games in the District. Because of the Prohibition, however, even a home team player – let alone a visiting team team player – would not be subject to D.C. income tax on income attributable to playing games in the District unless he maintained a permanent home in the District rather than, per general commuting patterns, in Virginia, Maryland, or where he lives during the off season. If the Prohibition did not apply and the District could tax the income of such home team and visiting team players, and assuming there are 85 duty days in the District for home team players and personnel, 81 duty days for visiting team players and personnel, and an average payroll for both the visiting and home teams, this would yield a tax base of approximately $52,063,000 ([81+85)/220] x $69,000,000). If you applied an average tax rate on this income of 7% – for 2005, the District's highest marginal tax rate was 9% on taxable incomes over $30,000 – this would yield annual revenue of $3,644,000, which would produce $109,000,000 over 30 years. Whatever are the merits of a new baseball stadium – on which amici intend no comment – the debate over those merits would likely have been much different if the Prohibition did not apply and this revenue stream had been available to help underwrite the stadium's cost.

GAO Report and Petitioners' Brief, it is the Prohibition that has caused high rates.

Removal of the Prohibition would permit a significant reduction in the structural imbalance and would place the District in the same position as other taxing jurisdictions that can tax income at its source. Nonresidents who work in the District benefit from public safety and public works-related services provided by the District. As an example, approximately eighty percent of all of the cars that benefit from the District's infrastructure are from Maryland and Virginia, yet the District cannot tax the income of car owners who work in the District to help pay for road maintenance. 148 Cong. Rec. E311 (daily ed. Mar. 11, 2002). As the Supreme Court noted in *Shaffer*, nonresidents who earn a living in a jurisdiction and benefit from governmental services in that jurisdiction have an obligation to contribute to the costs thereof. The Prohibition creates an unfair and discriminatory exception to this rule with respect to the District.

CONCLUSION

The Prohibition constitutes a unique departure from the rule that is otherwise generally applied that income can and will be taxed at its source. Furthermore, as outlined in the GAO Report, the Prohibition jeopardizes the District's financial health. For these reasons, and for those stated in Petitioners' Brief, the amici urge the court to grant a Writ of Certiorari as requested by Petitioners.

Respectfully submitted.

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